

DIRECT DIAL: (415) 796-5493
EMAIL ADDRESS: GINA.ROCCANOVA@JACKSONLEWIS.COM

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**VIA NLRB E-FILING PORTAL
AND ELECTRONIC MAIL TO:**
helen.yoon@nrlb.gov

Helen Yoon
National Labor Relations Board
Region 32
1301 Clay St., Suite 300N
Oakland, CA 94612-5224

**Re: The Kaiser Foundation Hospitals and Kaiser Foundation Health Plan, Inc.
Case No. 32-CA-285264**

Dear Ms. Yoon:

This letter constitutes the position statement of Respondent, The Kaiser Foundation Hospitals and Kaiser Foundation Health Plan, Inc. (“Kaiser” or the “Company”) in response to the above-referenced Charge filed by the Guild for Professional Pharmacists (“Guild”).¹

The Guild alleges that Kaiser violated the Act because it refuses to arbitrate three grievances. The Guild’s charges are legally and factually baseless. Over the last three years, Kaiser has processed—and continues to process—*dozens* of grievances. The parties exhaust the grievance process, engage in settlement discussions, mediate disputes, and where necessary, arbitrate grievances. Kaiser continues to follow this process for all disputes subject to the parties’ grievance procure.

Here, Kaiser has refused to process one “grievance,” which the Guild filed on behalf of retirees. Kaiser did not process this grievance because the Guild does not represent retirees, the

¹ This position statement is based upon information known to the undersigned at this time and is subject to supplementation or modification as other information is provided. It is not intended as substantive evidence nor is it to be considered as a binding admission of any facts in any judicial or administrative proceeding. Inclusion of information in this position statement does not constitute a waiver of any objection Kaiser may have to future discovery or information requests or the introduction of evidence in this or any subsequent proceeding, nor does it constitute a waiver of any objection or any other legal argument Kaiser may assert in the future. Further, Kaiser does not challenge the Board’s jurisdiction in this matter. Therefore, we are not providing a commerce questionnaire.

grievance procedure does not apply to retirees, and the Supreme Court recognizes that the Guild cannot represent retirees.

Ultimately, the Board continues to hold that an employer does not violate the Act when it refuses to arbitrate a narrow class of grievances and otherwise honors the grievance system, which is exactly what Kaiser continues to do. Based on longstanding NLRB and Supreme Court precedent, the Region should dismiss this charge absent withdrawal.

I. FACTUAL BACKGROUND

A. Kaiser and the Guild

The Kaiser Foundation Hospitals and Kaiser Foundation Health Plan, Inc. provides access to high-quality and affordable care. Kaiser employs pharmacists throughout Northern California at its inpatient and outpatient pharmacies, its consolidated prescription pharmacy, and pharmacy call centers. Kaiser also employs pharmacists who perform clinical work and direct patient care at the Kaiser Foundation Hospitals and Kaiser Foundation Health Plan locations.

The Guild for Professional Pharmacists is a labor organization that represents pharmacists who are currently employed by Kaiser in select Northern California Counties.² According to the CBA, the Guild's jurisdiction, only covers employees:

The Employer recognizes the Guild as the sole and exclusive bargaining agent of the employees covered by this Agreement for the purposes of collective bargaining with respect to rates of pay, hours of work and other terms and conditions of employment. Employees covered by this Agreement are those non-supervisory pharmacists, including Graduate Intern pharmacists, employed by the Employer at their inpatient and outpatient pharmacies, the consolidated prescription pharmacy, pharmacy call centers and pharmacists who perform clinical work and direct patient care at the Kaiser Foundation Hospitals and Kaiser Foundation Health Plan locations within the following counties....

(Exh. 1, CBA, Art.1, ¶ 101-02). Under the terms of the CBA, the Guild does not represent retirees. In fact, the grievance process is limited to pharmacists:

1003 Grievance Filing

² The CBA covers Kaiser pharmacies in the following California counties: Contra Costa, Yolo, Fresno, Madera, Santa Clara, Stanislaus, Napa, Alameda, Sacramento, San Mateo, San Francisco, Placer, Marin, Sonoma, San Joaquin and Solano

1004 Each grievance must be presented to the appropriate Step within thirty (30) calendar days after the pharmacist had knowledge of, or should have had knowledge of, the event causing the grievance, or the right to grieve the event shall be deemed waived. Grievances will be reduced to writing and presented at the appropriate Step specifying the nature of the grievance in reasonable detail, the provision(s) of the Agreement in dispute, the name(s) of the individual or individuals involved, if any, and the remedy demanded

(*Id.* at Art. X, ¶ 1003-04).

Thus, the CBA does not authorize the Guild to file a grievance on behalf of retirees.

B. Kaiser Continues to Process All Grievances Properly Filed under the CBA.

Kaiser processes dozens of grievances that the Guild files under the CBA every year. Specifically, between February 2019 and November 2021, Kaiser has processed seventy-two grievances filed by the Guild. Although the CBA expired on July 31, 2021, Kaiser continues to process all open grievances that are subject to the grievance process. Attached as Exhibit 2 is Kaiser's grievance and arbitration tracker that provides the status of all grievances filed since February 2019 and the Company's response.

Kaiser continues to work to resolve those grievances both through the grievance process, informal settlement negotiations and, if necessary, to arbitration, just like every other grievance that the Union has filed over approximately three years. Based on the substantial number of open grievances, it is not unusual for the parties to take more than one year to resolve a grievance. On March 16, 2021, the Guild filed a grievance concerning contributions to certain employees' supplemental retirement income plan. The Guild moved the matter to arbitration on August 19, 2021. (*See Exh. 2*, LR File 2021-223). On August 23, 2021, the Guild filed a grievance concerning safety practices at the South Sacramento Inpatient Pharmacy. The Guild moved the matter to arbitration on September 20, 201 (*Id.*, LR File 2021-571).

The parties' CBA expired on July 31, 2021, and the parties continue to bargain towards a new agreement. Kaiser continues to process all grievances filed under the expired CBA and remains committed process all disputes that the Union may properly pursue, including any grievance concerning disputes related to the supplemental retirement income plan and the safety of South Sacramento inpatient pharmacists.

However, on February 4, 2021, the Guild filed a grievance alleging that Kaiser improperly changed (1) how retirees may apply their medical subsidy payments and (2) the terms a retiree

medical plan that applies to retirees only. (See Exh. 3, Retiree Grievance Documents).³ Kaiser has refused to meet to address the grievance because the Guild is not authorized to file a grievance on behalf of retirees under the CBA.

II. LAW AND ANALYSIS

A. Kaiser Did Not Repudiate the CBA's Grievance Procedure

The Board has held that, where there is a collective-bargaining agreement containing a grievance-arbitration clause, “an employer’s refusal to take all, or even most, grievances to arbitration constitutes an 8(a)(5) violation.” *GAF Corp.*, 265 NLRB 1361, 1364-65 (1982); see also *Paramount Potato Chip Company, Inc.*, 252 NLRB 794 (1980); *Independent Stave Company, Diversified Industries Division*, 233 NLRB 1202 (1977). However, a refusal to arbitrate one type of grievance is not necessarily an unfair labor practice. *Id.* “Where an employer refuses to arbitrate a very narrow, specifically defined grievance subject matter, the Board has not found a violation of the Act.” *Id.*; see also *Whiting Roll Up Door Mfg. Corp.*, 257 NLRB 734 (1981); *Central Illinois Public Service Co.*, 139 NLRB 1407 (1962).

An unfair labor practice occurs only where an employer fully repudiates the parties’ negotiated grievance process. For example, in *Exxon*, the employer refused to arbitrate a variety of grievances that “implicated a range of contractual issues, [and] not a narrow class of issues.” *Exxon*, 340 NLRB 357, 359 (2003). In *Exxon*, the employer refused to arbitrate any open grievance. The Board held that “by refusing to arbitrate any of the grievances that had arisen during the life of the bargaining agreement, the [employer] unilaterally abandoned or repudiated the contractual grievance-arbitration procedure, thereby refusing to bargain with the Union in violation of Section 8(a)(5).” *Id.* (emphasis added).

Unlike the facts in *Exxon*, where the employer refused to arbitrate or process a single grievance, Kaiser has processed—and continues to process—71 grievances during the life of the agreement—all while negotiating for a new collective bargaining agreement with the Guild. Indeed, Kaiser represents that it will continue to process all grievances properly filed through the parties’ standard procedure and timelines for resolving grievances.

B. A Refusal to Arbitrate a Narrow Issue Concerning Retirees Does Not Violate The Act

Contrary to the Guild’s charge that Kaiser has repudiated the parties’ grievance procedure, the Guild improperly sought to file a grievance that it does not have the jurisdiction or authority to pursue through the CBA. Retirees are not represented by the Guild under the plain language of the CBA, and retirees cannot turn to the parties’ grievance procedure. The Supreme Court recognizes

³ While Kaiser maintains that the Guild cannot turn to the parties’ the grievance process to resolve issues related to retirees, there is also no breach of the CBA. The Guild seeks to implement unique reimbursement options not required under the CBA.

that retirees are not employees. *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (holding that retirees are not ‘employees’ within the meaning of section 8 (a)(5) and . . . the Company was under no constraint to collectively bargain improvements in their benefits with the Union).

“Section 9 (a) of the Labor Relations Act accords representative status only to the labor organization selected or designated by the majority of employees in a unit appropriate for the purposes of collective bargaining.” *Id.* The Supreme Court in *Pittsburgh Glass* held that “retirees could not properly be joined with the active employees in the unit that the Union represents.” *Id.* at 172. Ultimately, the Court concluded that “retirees are neither ‘employees’ nor bargaining unit members.” *Id.* at 176. Based on Supreme Court precedent and the plain language of the CBA, the Guild cannot seek to use the grievance process to resolve retirees’ complaints.

In a practically identical scenario in *GAF Corp.*, the Board held that an employer’s refusal to arbitrate the single, narrow issue of retirement benefit calculations for retirees did not violate the Act. The Board noted that the employer’s refusal to arbitrate was based on the company’s interpretation of the CBA and the fact that the union applied the incorrect appeals procedure. *GAF Corp.*, 265 NLRB at 1365. Therefore the Board refused to hold that such a decision constitutes an unfair labor practice.

Based on longstanding Supreme Court and NLRB precedent and Kaiser’s continued agreement to process dozens of grievances, the Guild cannot establish that Kaiser’s refusal to arbitrate one narrow issue that is outside the scope of the CBA violates the Act.

III. Conclusion

The Company has not repudiated the CBA or engaged in a wholesale refusal to process grievances as evidenced by the fact that the parties continue to process numerous grievances while bargaining for a new agreement. For each and all of the foregoing reasons, the Region should dismiss the Guild’s charge, because there is no evidence that Kaiser violated the Act.

Please contact me directly if you require further information and thank you for your consideration in this matter.

Sincerely,

JACKSON LEWIS P.C.

/s/
Gina Rocanova

Enclosures